



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Stemaco Products, Inc.

File: B-243206

Date: March 27, 1991

Howard Stein for the protester, Mary G. Curcio, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where contracting officer determines that small business bidder is not responsible because the bidder will subcontract more than 50 percent of the cost of manufacturing the supplies requested by the solicitation, not including the cost of materials, and the bidder fails to apply to the Small Business Administration for a certificate of competency, the General Accounting Office will not consider a bidder's challenge to the agency's nonresponsibility finding.
2. Protester determined to be nonresponsible is not eligible to receive a contract award and thus is not an interested party to maintain protest that solicitation is defective.

DECISION

Stemaco Products, Inc. protests the rejection of the bid it submitted in response to invitation for bids (IFB) No. N00164-90-B-0039, issued by the Department of the Navy for containers.

We dismiss the protest.

The IFB was issued as a 100-percent small business set-aside. Stemaco submitted the low bid under the solicitation, and the contracting officer requested a pre-award survey on the firm to determine if the firm was a responsible contractor. The survey team concluded that Stemaco was not a responsible contractor because the firm, which is not a regular dealer of the containers, intended to subcontract work amounting to greater than 50 percent of the cost of manufacturing the supplies, not including the cost of materials, and Stemaco therefore did not comply with Federal Acquisition Regulation (FAR) § 52.219-14. The contracting officer referred the nonresponsibility determination to the Small Business

Administration (SBA) for a final determination of Stemaco's responsibility under its certificate of competency (COC) procedures and Stemaco was requested to submit a COC application.

Stemaco did not file for a COC with the SBA. Instead, Stemaco protested to our Office that the issue involved is not an issue of competency or performance but rather an issue of law and thus falls outside the SBA COC procedures. Stemaco argues that the firm should not be required to adhere to the COC procedures.

When a small business firm is determined to be nonresponsible by a contracting officer, the contracting officer must refer the matter to the SBA for consideration of a COC. 15 U.S.C. § 637(b)(7) (1988). After the referral has been made, it is incumbent upon the small business to file a complete and acceptable COC application with the SBA in order to avail itself of the potential protection provided by statute against unreasonable or bad faith determinations of nonresponsibility. Commerce Funding Corp., B-236114, Oct. 2, 1989, 89-2 CPD ¶ 287. Where a firm fails to apply for a COC with the SBA, we will not review the contracting officer's determination of nonresponsibility since doing so would amount to substituting our Office's judgment for the judgment of the SBA, which is specifically authorized by statute to review these determinations. Belmont-Schick Inc., B-225100, Nov. 14, 1986, 86-2 CPD ¶ 562.

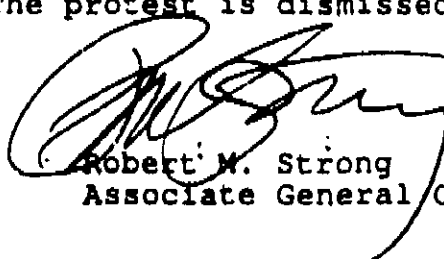
Here, contrary to Stemaco's allegation, whether a small business bidder under a small business set-aside procurement for supplies will perform more than 50 percent of the cost of manufacturing the supplies, not including the cost of the supplies, with its own employees, concerns the bidder's responsibility, and is a matter for consideration by the SBA in connection with COC proceedings. See Howell Constr. Co., Inc.--Recon., B-237231.2, Nov. 3, 1989, 89-2 CPD ¶ 425; Diversified Computer Consultants--Recon., B-230313.3, Sept. 20, 1988, 88-2 CPD ¶ 265. Consequently, once the contracting officer determined that Stemaco was nonresponsible because it did not intend to perform enough of the work itself, and referred that decision to the SBA, Stemaco was required to file for a COC. Since Stemaco did not do so, we will not review this issue further.

Stemaco also protests any award under the solicitation because, according to Stemaco, the contracting agency has determined that the solicitation is defective concerning the quality inspection provision. Stemaco further argues that any amendment to the solicitation concerning this defect would have an impact on bidders' prices. As issued, the IFB requires that the containers be inspected by the agency in

accordance with MIL-I-45208A at the delivery destination; apparently this is a higher level of inspection than is normally required. In reviewing the contract data package after award, the agency found that it was defective because, if the higher quality inspection requirement was to stand, the inspection should take place at the origin of the containers and not at the delivery destination. The reviewer recommended that the requirement be amended to either require inspection at source, or to lower the quality standard that would be used to inspect the items at destination.

A firm not eligible for award is not an interested party to maintain a protest. See Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1990); Syllor Inc./Ease Chemical, B-236162 et al., Jan. 2, 1990, 90-1 CPD ¶ 1. Here, the contracting officer determined that Stemaco is not a responsible firm and Stemaco did not file a COC application with the SBA. Thus, Stemaco is not eligible to receive a contract award and is not an interested party to maintain a protest against the solicitation.

The protest is dismissed.



Robert M. Strong
Associate General Counsel